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No. 87-698

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

GEORGE W. McMANUS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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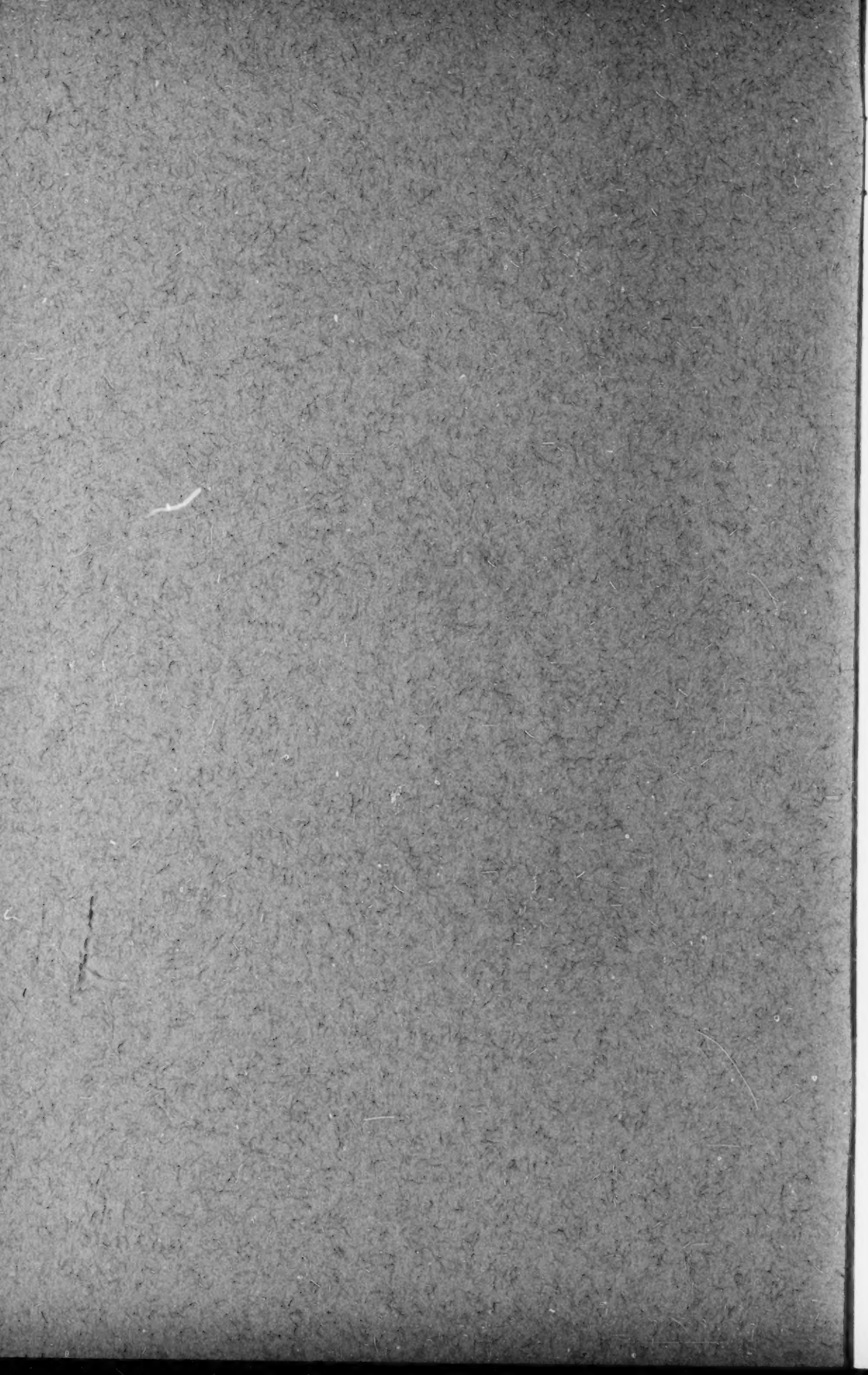
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QUESTION PRESENTED

Whether the government's use of the tax returns of three defense witnesses to cross-examine them at trial constituted plain error.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 826 F.2d 1061 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1987. A petition for rehearing was denied on September 1, 1987 (Pet. App. 5a-6a). The petition for a writ of certiorari was filed on October 30, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of attempted income tax evasion and subscribing to a false income tax return for the tax years 1979 and 1980, in violation of 26 U.S.C. 7201 and 7206(1). Petitioner was sentenced to two years' imprisonment, fined \$20,000, and

ordered to perform 2,500 hours of community service. The court of appeals affirmed. Pet. App. 1a-4a.

Evidence introduced at trial established that petitioner, a Baltimore attorney, signed and filed false and fraudulent income tax returns for the years 1979 and 1980. During those years, petitioner failed to report nearly \$1,000,000 in income and evaded more than \$550,000 in income taxes (Pet. App. 2a). The unreported income consisted of legal fees and commissions that petitioner earned in connection with his law practice, and interest income he earned from numerous bank accounts and certificates of deposit at six different banks in New York, Texas, Florida, and Maryland in 1979, and at ten different banks in those states in 1980. *Ibid.*; Gov't C.A. Br. 3.

Petitioner conceded that his tax returns failed to include substantial income he had received from legal fees and interest. The issue at trial was whether those omissions were caused by a willful scheme to evade taxes or by petitioner's inattention to his tax returns and the negligence of his bookkeeper in maintaining and providing to his accountant the information needed to prepare complete returns. Pet. App. 2a.

Several people who had worked for petitioner testified in support of his defense. The government used the tax returns of three of those witnesses in cross-examining them (C.A. App. 120-132), and the trial court admitted the returns of two of those witnesses into evidence (*id.* at 121-122, 132). Petitioner did not object to any of the cross-examination, and he failed to object to the admission of the returns of one of the witnesses (*id.* at 121-122). With respect to the introduction of the returns of the second witness, petitioner noted an objection, but he failed to state any grounds for that objection (*id.* at 132). With respect to the introduction of the returns of the third witness, petitioner noted an objection on the ground of

relevance, and the court declined to admit that witness's returns into evidence (*id.* at 126).

On appeal, petitioner argued that the government's use of tax returns in cross-examining witnesses violated the Tax Disclosure Act, 26 U.S.C. (& Supp. III) 6103, and deprived him of a fair trial. The court of appeals rejected that claim on the ground that petitioner did not preserve it in the district court, and that the error, if any, did not constitute plain error. In particular, the court noted that petitioner "failed to comply with Federal Rule of Evidence 103 because he failed to object in a way that stated the specific ground of objection" (Pet. App. 2a). In any event, the court held, the government's "limited use of the returns was fair and proper" (*ibid.*).

ARGUMENT

Petitioner contends that the government's limited use of the tax returns of three defense witnesses violated the Tax Disclosure Act, 26 U.S.C. (& Supp. III) 6103, and that the violation constituted plain error.

1. The Tax Disclosure Act generally prohibits the use of tax returns merely to impeach witnesses at trial. In pertinent part, the Act provides that return information of a third party may be used in a judicial proceeding relating to tax administration only "if the treatment of an item reflected on such return is directly related to the resolution of an issue in the proceeding" (26 U.S.C. 6103(h)(4)(B)) or "if such return or return information directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer which directly affects the resolution of an issue in the proceeding" (26 U.S.C. 6103(h)(4)(C)).

a. The tax return information in this case was not used for general impeachment, but for much more limited pur-

poses, as the court of appeals noted (Pet. App. 2a). Of the three defense witnesses who were questioned about their tax returns, the first was an employee of petitioner's, who was asked by defense counsel on direct examination, "[d]o you report your income that you receive from [petitioner] to the Internal Revenue Service every year?" She answered that she did (VI Tr. 17). On cross-examination, the government elicited that petitioner had not given her a W-2 or 1099 form and that she had not reported any of her income from petitioner during 1979, 1980, and 1981. Her tax returns were admitted into evidence without objection in order to confirm that fact. C.A. App. 116-122.

In cross-examining the second defense witness, an attorney who had worked for petitioner and whose wife also had worked for petitioner, the government inquired about the salary petitioner paid him. The witness could not recall his salary, but he agreed that his tax return would help refresh his recollection. The witness said that the return showed the salary that he received from petitioner. When the prosecutor asked the witness whether his wife's income was reported together with his, the witness said it was not, but he was unable to say whether his wife's income had been reported anywhere on the form. The witness's returns were admitted into evidence. Petitioner's counsel objected, but stated no basis for the objection. C.A. App. 128-132.

The third witness testified that she had worked for petitioner without salary since 1967. When the government sought to introduce her tax returns to show the absence of any reported income from petitioner, defense counsel objected on relevance grounds, and the court sustained the objection. C.A. App. 125-126. Accordingly, no return information was disclosed at trial with respect to that witness.

b. Petitioner's counsel clearly opened the door to cross-examination regarding the tax returns of the first

defense witness. Petitioner had elicited on direct examination the witness's assertion that she paid taxes on all the income she received from petitioner. In fact, her tax returns showed that that was not so. Even if it otherwise would not have been proper for the government to offer her tax returns into evidence, the situation changed when petitioner's counsel elicited the false statement that the witness paid taxes on all the income she received from petitioner. Petitioner cannot be permitted to use the Tax Disclosure Act as a sword by eliciting false testimony at trial and then attempting to bar the government from correcting that false testimony by reference to tax return information on cross-examination. See generally *Harris v. New York*, 401 U.S. 222 (1971). Under these circumstances, it is not surprising that petitioner's counsel did not object to the government's cross-examination or the admission of the witness's tax returns.

The returns of the second defense witness were likewise offered for a legitimate purpose. The return information revealing the amount that petitioner paid his employees during the years in which petitioner is alleged to have evaded taxes "relate[d] to a transactional relationship between a person who is a party to the proceeding and the taxpayer" that "directly affect[ed] the resolution of an issue in the proceeding" (26 U.S.C. 6301(h)(4)(C)).

More generally, the manner in which petitioner's employees treated the income they earned at his law firm shed light on the disputed issue of petitioner's willfulness in evading payment of his income taxes and subscribing to false income tax returns for the years in question. The evidence at trial showed that by failing to provide certain of his employees and the Internal Revenue Service with W-2 or 1099 forms, petitioner allowed those employees to evade their income tax obligations. That evidence tended to rebut petitioner's defense that his underreporting of his

own income was merely the product of inadvertence and carelessness. Accordingly, the court of appeals was correct in concluding that the limited use of the tax return information in this case was "fair and proper" (Pet. App. 2a).

2. In any event, even if the admission of the tax returns violated Section 6103, petitioner's failure to object on that ground at trial was properly held to preclude review of the matter.

In order to preserve an evidentiary claim for appellate review, a party must make a specific objection stating the ground on which the admission of the evidence is opposed. A general objection, or an objection on different grounds, is not sufficient. Fed. R. Evid. 103(a)(1). See *United States v. Helmel*, 769 F.2d 1306, 1316-1317 (8th Cir. 1985); *United States v. Wormick*, 709 F.2d 454, 460 (7th Cir. 1983); *United States v. Hutcher*, 622 F.2d 1083, 1087 (2d Cir.), cert. denied, 449 U.S. 875 (1980); 21 C. Wright & K. Graham, *Federal Practice and Procedure: Evidence* § 5036, at 174 (1977).

Petitioner never suggested at trial that the use of the tax returns violated Section 6103(h). Consequently, petitioner is entitled to no relief unless the admission of the returns constituted "plain error." Petitioner has failed to satisfy that exacting standard, because he has failed to show that, when measured against the entire record, the claimed error seriously affected his "substantial rights" and had an unfair prejudicial impact on the jury's deliberations. *United States v. Young*, 470 U.S. 1, 15, 16, 17 n.14 (1985). Because the cross-examination of the three defense witnesses constituted only a small feature of the lengthy trial, the government's limited use of the third-party returns was certainly "not such as to undermine the fundamental fairness of the trial and contribute to a miscarriage of justice." *Id.* at 16.

The prohibitions in the Tax Disclosure Act are not designed to ensure a fair trial for defendants; they serve

the very different purpose of protecting the privacy of tax return information, even at some cost to the accuracy of factfinding in court proceedings. For that reason as well, the plain error doctrine should not be invoked here. The admission of the tax returns in this case, even if error, did not contribute to an unfair proceeding or an inaccurate verdict. At most, it disclosed third-party returns under circumstances in which Congress intended those returns to remain private. The sanction for such an error, if it was an error, should not be reversal of the conviction of someone other than the party whose privacy interests were violated.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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